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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 36

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of petitioner, refusing to vacate certain portions of his order granting a bill of particulars in a criminal case (R. 58–60), is not reported. The original order of the court of appeals denying the government's petition for a writ of mandamus (R. 110–111), and its order granting the writ after reconsideration (R. 113), are not reported.

JURISDICTION

The order of the court of appeals, directing petitioner to vacate his order that the government furnish certain particulars, was entered on October 4, 1966

(R. 113), and a petition for a rehearing *en banc* was denied on December 5, 1966 (R. 113–114). The petition for a writ of certiorari was filed on December 29, 1966, and granted on March 13, 1967 (R. 115). 386 U.S. 955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner is a federal district judge. In a proceeding for criminal tax evasion, he ordered the government to disclose to the defense, in its bill of particulars, the names and addresses of all private individuals to whom, or in whose presence, the defendant had made any admissions or other relevant statements. The question presented is whether, in view of the limitations which the Federal Rules of Criminal Procedure place on discovery, the judge's action constituted a clear abuse of discretion that the court of appeals could properly correct by issuing a writ of mandamus.

RULES INVOLVED

Rules 7(f), 15 and 16 of the Federal Rules of Criminal Procedure, as amended to July 1, 1966, are printed in the Appendix, *infra*, pp. 28–32.

STATEMENT

In June 1965, Simmie S. Horwitz was indicted in the United States District Court for the Northern District of Illinois on charges of wilfully subscribing 1958 and 1959 corporate income tax returns of Scott Pharmacy, Inc., which—as he well knew—understated the corporation's actual sales, in violation of 26 U.S.C. 7206(1) (R. 13–15).

The defendant, contending that the indictment was so vague and indefinite that he could not determine the exact nature of the charges or prepare an adequate defense (R. 21–22), filed a motion for a bill of particulars asking that the government be required to answer 30 Requests, set forth below,[1] covering every

[1] 1. State what is the specific act or acts the Government alleges to have been committed by the Defendant in each of the years 1958 and 1959 in violation of Section 7206(1).

2. State what act or acts did the Defendant perform in order to "make" the United States Income Tax Return which are the subject of the captioned Indictments. Give the date and place of each such act.

3. State what act or acts did the Defendant perform in order to "subscribe" the United States Income Tax Returns which are the subject of the captioned Indictments. Give the date and place of each such act.

4. State with specificity what criminal act or acts were performed by the Defendant on June 16, 1959, as alleged in Indictment 65 CR 432.

5. State the alleged correct amount of the gross sales for Scott Pharmacy, Inc. for each of the years 1958 and 1959.

6. State respectively for each of the said years the amount and source of each and all of the items added to the reported gross sales in computing the amounts stated in answer to Request No. 5.

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any deductions allowed or allowable against the said gross amounts.

8. State the amount and source of each and all of the items of deduction allowed in computing the alleged correct amount of gross sales for each of the said years.

9. State the amount and source of each and all of the items of deduction disallowed in computing the alleged correct amount of gross sales for each of the years.

10. State whether the Government relies upon any books, records, documents or other papers of Scott Pharmacy, Inc. obtained by the Internal Revenue Service. If so, state with

detail of the alleged offenses (R. 16–21). At a hearing on November 29, 1965, petitioner directed the government to answer all the defendant's Requests, with the exception of Nos. 4 and 29(b) (R. 10, 53, 63–64). The government objected that, if required to answer 29(a),

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specificity which such books, records, documents or other papers or portion thereof, when the same were obtained, where obtained, and by whom and from whom obtained.

11. State whether the Government will rely on proof upon the net worth, expenditures, bank deposits, or other theory or method of proof and, if so, whether said theory will be relied upon in whole or in part as corroborative of any other method of proof, including the specific receipt method. State also whether the said method of proof applies to proof of additional gross sales of the Corporation and/or income or other benefit to the Defendant.

12. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the so-called net worth and/or expenditures method, then state the character and value of each asset owned by the Corporation and/or the Defendant, including the amount of cash on hand, on deposit, and receivables at the beginning and end of each of the said years covered by the Indictments.

13. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the said years in reliance in whole or in part upon the so-called bank analysis or bank deposit method, list the bank accounts analyzed and itemize the deposits alleged to constitute unreported gross sales, setting forth the source, where known, deposits constituting transfers or redeposits and deposits conceded to be non-income items.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

15. State whether any of the alleged unreported gross sales was received directly, in each of the said years, by the De-

it would have to disclose the names of all prosecution witnesses, thus exposing them to harassment (R. 64–66). Petitioner stated that he might reconsider his ruling, but was emphatic that he would not do so un-

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fendant, and, if so, identify the date and amount of such direct receipts.

16. State whether the alleged unreported gross sales in each of the said years was indirectly received by the Defendant and, if so, state the date, amount, and nature of such receipts.

17. State upon which line and page of each of the respective United States Income Tax Returns alleged in the Indictments there appears the material matter alleged to be believed by the Defendant as not true and correct.

18. Does the Government claim there are any other material matters contained in each of the respective U.S. Income Tax Returns alleged in the Indictments which are not true and correct and which the Defendant believed were not true and correct when he allegedly subscribed the said returns.

19. If the answer to Request No. 18 is in the affirmative, state as to each such material matter:

a. The nature thereof;

b. Wherein the same appears on the respective income tax return;

c. The correct material matter, including the amount and source, the date received or expended, and the payor or recipient thereof.

20. Is the Government now in possession of any books, papers, documents or tangible objects obtained from or belonging to the Defendant or obtained from others by seizure or by process.

21. If the answer to Request No. 20 is in the affirmative, state with particularity:

a. The nature and description of each such book, paper, document, or tangible object;

b. From whom obtained;

c. When obtained;

d. Whether the same was obtained by seizure or by process;

e. The nature of the process;

f. Whether the Government intends to rely on all or part

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less the government made a reasonable showing that witnesses were being harassed (R. 65–66).

The government moved that petitioner vacate his previous order insofar as it directed answers to Requests 7, 14, 25, 28 and 29(a), on the ground that such answers would furnish a list of the government's witnesses. The motion was heard on December 3, 1965 (R. 10, 11, 68–78). Petitioner acknowledged that he had made it a practice to require the prosecution to

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of the said books, papers, documents, or tangible objects, and, if so, which part or parts, and for what purpose.

22. Does the Government rely upon any acts, including but not limited to the acts stated in the respective counts of the Indictments, performed by the Defendant to support the charge in the several counts of the Indictments that the Defendant made and subscribed a return which he did not believe to be true and correct as to every material matter.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim tran-

turn over to the defense the names of all persons known to have participated in or to have been present at the alleged offense, in order to enable the defense to interview them and ascertain their prospective testimony (R. 68–78, *passim*). Petitioner stated that this was not the same as requiring the prosecution to turn over a list of witnesses, because it was very likely that some of these persons would not be called as witnesses at the trial (R. 68–71, 77). Petitioner said (R. 75):

> You know, I have great concern that in a civil case we require both sides to submit their wit-

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script of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

26. Does the Government rely upon any written statement of the Defendant to support the charge in the several counts of the Indictments.

27. If the answer to Request No. 26 is in the affirmative, state with respect to each such written statement, if there was more than one:

a. The date the written statement was made;

b. The names and addresses of the person or persons to whom the said written statement was given;

c. The substance of the written statement; and

d. Whether the statement is now in the possession of the Government.

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

30. State whether the Government will rely in full or in part on the truth or falsity of any personal United States Income Tax Returns filed by the Defendant. If so, state which returns and the particular matter contained therein upon which the Government will rely.

> nesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview him when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases. * * *

The prosecutor pointed out that there was a distinction in that, in criminal cases, there was always "more chance, more reason to construct a fabrication" (R. 76). Petitioner indicated that he would rule differently if such were the fact, but that there had been no showing that either harassment of the witnesses or fabrication of evidence was likely to occur in this case (R. 75, 76–77).[2] On December 7, 1965, the motion to vacate the previous order was denied, except that the government was excused from answering Request 25(d) (R. 54, 58–60).

The government filed a bill of particulars on December 10, 1965 (R. 11, 22–34), with amendments thereto on January 4 and March 14, 1966 (R. 11–12, 34–52), which together provided answers to all Requests the government had been directed to answer except 25 and 29(a). At a hearing on the morning of January 4, 1966, the government informed petitioner

[2] In response to the prosecutor's comment that petitioner's liberal view had not been adopted by the American Bar Association [*sic*] in its proposed amendments to criminal discovery procedure, petitioner conceded that he "would go further than they go" (R. 77). The reference was apparently to the amendments prepared by the Advisory Committee on the Criminal Rules, which were, at the time of the hearing, still pending before this Court.

that it would respectfully refuse to answer those Requests.[3] Counsel for defendant then moved, in the alternative, that the indictment be dismissed or the United States Attorney be held in contempt. Petitioner, however, simply ruled that he would postpone the trial indefinitely (R. 78–80). That afternoon, upon complaint by defense counsel that petitioner's ruling would deprive Horwitz of a speedy trial, petitioner altered the ruling to give the government 60 days to reconsider its stand (R. 80–82).

After the expiration of the 60-day period, there was another hearing, on March 7, 1966. (R. 82–89). Petitioner withdrew his direction that the government answer Request 29(a), which, in effect, called for a list of all the government's witnesses. He explained that he did so "just to keep the record clear" and in order to have "no question about the propriety" of his action, should he decide to dismiss the indictment (R. 87). Petitioner insisted, however, that Request 25 be answered, and he gave the government an additional week for consideration (R. 88–89). This Request states (R. 20):

> 25. If [the government relies upon any oral statements of the defendant], state with respect to each such statement, if there was more than one:
>
> a. The name and address of the person to whom the statement was made;
>
> b. The date on which the statement was made;

[3] The government also refused, at this time, to answer Request 14 (R. 78), but an answer to this question was provided on March 14 (R. 12, 45–52).

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

At the hearing on March 14, 1966 (R. 89–106), the government pointed out that it had now given the defense its entire case, with the exception of oral statements made by Horwitz himself, and it again specifically asked petitioner to vacate his order directing that Request 25 be answered (R. 90). The government further narrowed the issue as to Request 25 by agreeing to give the defense all oral statements made by Horwitz to government agents (R. 92–93), thus limiting its objection to oral statements by Horwitz to third-party informants who were not participants in the alleged offense[4] (R. 93, 94–96, 102). The government urged that there was always a danger that such witnesses would be subjected to improper pressures if their identities were revealed (R. 94, 98–99; cf. R. 76).

[4] Petitioner changed his mind several times about whether to require the government to answer Request 25(d) by giving the substance of oral statements made by Horwitz to informants. Ultimately, he decided that the government should reveal the substance of statements made to government agents, but not the substance of those made to third-party informants (R. 79, 84–89, 92–93, 98).

But petitioner, noting that the government had attempted no specific showing of such a danger in this case, refused to change his ruling (R. 93–103; cf. R. 76–78).

The government then obtained from the court of appeals a stay of further proceedings and, on March 21, 1966, filed with that court a petition for a writ of mandamus directing petitioner to vacate his order that it answer Request 25 (R. 1–7). On March 24, 1966, the court ordered petitioner to show cause why the writ should not issue (R. 61–62). On July 12, 1966, a panel of the court of appeals denied the writ (R. 110–111), but upon the government's motion for reconsideration the panel, on October 4, 1966, issued the writ as requested by the government. On December 5, 1966, the court *en banc* denied petitioner's request for a rehearing (R. 112–114).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner, a federal district judge, has acknowledged the adoption of a uniform rule in his courtroom requiring the government in a criminal case to furnish the defense, on motion for a bill of particulars, a list of potential witnesses. Applying this policy in the instant tax-evasion case, Judge Will ordered the government to turn over to the defense the names and addresses of all individuals to whom or in whose presence the defendant had made admissions or other relevant statements. Rather than comply, the government sought and obtained from the court of appeals a writ of mandamus directing Judge Will to vacate

his order. Two issues are presented: whether his order constituted an abuse of discretion, and, if so, whether it could properly be corrected by mandamus.

1. Petitioner's flat rule requiring the government to furnish a list of potential witnesses might be quite appropriate if the liberal notions of discovery embodied in the Federal Rules of Civil Procedure had been carried over into the criminal rules; but they were not. Concern with the danger of witness intimidation and fabrication of defenses has resulted in sharply circumscribing the criminal defendant's right to pre-trial discovery; and less than two years ago, this Court, in amending the criminal rules, rejected urgings to reverse this policy.

That is not to say that a defendant is never entitled to any glimpse of the government's case in advance of trial. He is entitled to sufficient disclosure to enable him to prepare his defense and to enter a plea of double jeopardy in the event of a subsequent prosecution for the same offense. The proper office of the bill of particulars is to protect these interests. The broad disclosure compelled here was not based on such considerations. Rather, Judge Will's rule reflects unwillingness to accept the traditional limitations upon criminal discovery.

It is also at war with this Court's rulings relating to the informant's privilege. Recognizing the privilege's importance to law enforcement, the Court has indicated that it should not be overridden in an individual case unless the particular circumstances require. Judge Will made no effort to ascertain the particular needs of the defendant. In fact, it is clear

that since the government had undertaken in this case to disclose the informants' identity at the time of trial, defendant's only interest is the enjoyment of the very advantage traditionally denied criminal defendants—pre-trial discovery. That interest cannot outweigh the public interest in shielding informants from pre-trial harassment.

2. Mandamus will lie to correct a district judge's persistent disregard of the requirements of the federal rules, whether or not his error be deemed of jurisdictional magnitude. Mandamus has also been held by this Court to be an appropriate procedure for testing fundamental questions of first impression concerning the interpretation of those rules; and the present case, touching as it does a basic—and, in light of the recent amendments to the rules, novel—question of criminal procedure, clearly meets that criterion, too. Nor is there any other feasible procedure whereby to obtain a determination of the question by the appellate courts—whose duty it is, after all, to assure the uniform interpretation and application of the federal procedural rules.

Mandamus is not unsuitable merely because the procedural issue here arises in the context of a criminal proceeding. The supervisory responsibilities of the federal appellate courts over district judges are, if anything, greater in the criminal than in the civil sphere. And the policy that circumscribes government appeals in criminal cases is not undermined, so long as mandamus is reserved for extraordinary circumstances. Judge Will's persistent disregard of a funda-

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mental tenet of federal criminal procedure cannot be likened to a routine ruling, as to which—we readily concede—mandamus should not lie.

I. IN HIS RULING UPON THE DEFENDANT'S REQUEST FOR A BILL OF PARTICULARS, JUDGE WILL CLEARLY EXCEEDED HIS AUTHORITY UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE. MOREOVER, THE RULING INSTANCES HIS PERSISTENT DISREGARD OF THE LIMITED SCOPE OF DISCOVERY PERMITTED BY THE FEDERAL CRIMINAL RULES

A. Rule 7(f) of the Federal Rules of Criminal Procedure authorizes the district court to direct the filing of a bill of particulars. No criteria are specified, and the court's discretion is broad. *Wong Tai* v. *United States,* 273 U.S. 77, 82. But that discretion must, of course, be exercised within the limitations prescribed by the federal rules. One such limitation is upon pretrial discovery. Unlike the civil rules, the criminal rules allow discovery only in narrowly limited circumstances, not here relevant. See Rules 15, 16; *Bowman Dairy Co.* v. *United States,* 341 U.S. 214. Consistently with this settled policy, bills of particulars have been granted to protect the defendant against a second prosecution for the same offense and to enable him to prepare his defense without fear of unfair surprise (*Norris* v. *United States,* 152 F. 2d 808, 811 (C.A. 5), certiorari denied, 328 U.S. 850), but not to compel disclosure of the government's evidence in advance of trial (*United States* v. *Kushner,* 135 F. 2d 668, 673 (C.A. 2), certiorari denied, 320 U.S. 212; *United States* v. *Lebron,* 222 F. 2d 531, 535–536 (C.A. 2), certiorari denied, 350 U.S. 876; *Downing* v. *United*

States, 348 F. 2d 594, 599 (C.A. 5), certiorari denied, 382 U.S. 901).

Some have thought the limitations on the scope of criminal discovery unwise and unwarranted; others have defended them, noting that, with life or liberty at stake, a criminal defendant apprised well in advance of trial of the details of the government's case might be tempted to procure perjured testimony or intimidate government witnesses (*e.g., State* v. *Tune,* 13 N.J. 203, 210–211, 98 A. 2d 881 (Vanderbilt, C.J.)). We do not enter upon that controversy here. It has been stilled for the time at least by this Court's refusal, in recently amending the Federal Rules of Criminal Procedure, to adopt the broad discovery provisions urged vigorously upon it from some quarters. See, *e.g., Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 95–96 (Symposium at the Judicial Conference of the District of Columbia Circuit, 1963); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U. L. Rev. 228 (1964).[5] Even if this Court were disposed so soon to re-examine its decision to retain the

[5] It is true that Rule 7(f) was amended (effective July 1, 1966) to eliminate the requirement that cause be shown by the defendant to direct the filing of a bill of particulars by the government, and that the Notes of the Advisory Committee state that the object of the amendment was to liberalize the granting of bills of particulars. There is no indication, however, of any purpose to transform the bill of particulars into an instrument of broad discovery. Had that been this Court's design, surely it would have amended the rules which deal with discovery—Rules 15 and 16. We note also that the government's petition for mandamus was filed in the court of appeals before the effective date of the new rules—at a time, that is, when the former and more restrictive rules remained technically in force.

traditional limitations upon criminal discovery, this case hardly presents an appropriate occasion. Fully pertinent here is the Chief Justice's observation for the Court in *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 323, that "[w]hether the setoff and cross-libel procedure [of the Admiralty Rules prescribed by this Court] now operative in admiralty is anachronistic, is not a matter best considered by this Court in a litigation without the benefits which normally accompany intelligent rulemaking—including hearings and opportunities to submit data."[6]

A corollary to the principle which limits discovery in federal criminal cases is that the government is rarely required to furnish the names of its witnesses in advance of trial. *United States* v. *Eddington*, 328 F. 2d 760, 761 (C.A. 7), certiorari denied, 379 U.S. 818; *United States* v. *Lebron*, 222 F. 2d 531, 535–536 (C.A. 2), certiorari denied, 350 U.S. 876; Symposium, *supra*, 33 F.R.D. at 105; Traynor, *supra*, 39 N.Y.U. L. Rev. at 233. This is consistent, of course, with the federal statute which requires the furnishing of a witness list *only* in a capital or treason case, and then only three days before commencement of trial. 18 U.S.C. 3432; see *United States* v. *Van Duzee*, 140 U.S. 169, 173. One of the changes most vigorously urged by those who advocated a liberalization of the discovery provisions of the criminal rules was adoption of a requirement that the names and addresses of gov-

[6] The Court also noted that Congress has entrusted the Judicial Conference of the United States with advisory responsibilities in the area of procedure (see Act of July 11, 1958, 72 Stat. 356) that decisional modification of the federal rules would circumvent.

ernment witnesses be furnished to the defendant in advance of trial. Symposium, *supra,* at 96; see Traynor, *supra,* at 236, 244. No such amendment was made. Quite obviously, a witness list is a powerful—is indeed the critical—discovery tool. Equipped with such a list, a defendant should have little trouble ferreting out the government's evidence and piecing together the details of the government's case. To furnish such lists routinely would expose the government's witnesses to intimidation and mark a substantial inroad into the policy of limited criminal discovery that this Court, as we have noted, has so far declined to change.

B. Despite the settled limitations upon the scope of criminal discovery, Judge Will in this case ordered the government, as a matter of course, without any showing by the defense of special need, to furnish the defendant with a list containing the names and addresses of all private individuals to whom, or in whose presence, defendant had made admissions or other statements relevant to the criminal charges.[7] Such a list, plainly, would expose the heart of the government's case by revealing to the defense the individuals who could furnish the most damaging direct testimony of defendant's guilt—testimony as to his own admissions. It would thus constitute a potent tool of discovery. But it is difficult to see how production of such a list could, in the circumstances of this case, be justified as necessary to prevent unfair surprise. In response to the motion for a bill of particulars, the government furnished the defendant with allegations as to the specific acts committed by him; the correct

[7] The government was willing to produce the names of any government officers to whom such statements had been made.

amount of corporate gross sales for each year; the amount and the source of the unreported sales; the amount and the source of the deductions allowed by the government; the fact that none of the claimed deductions were disallowed; a complete list of the corporate books, records and other documents upon which the government was relying; the government's theory of the case, including the fact that it was not relying upon net worth proof; the entries on the tax return that were alleged to be untrue; the fact that the government did not rely upon any written statement made by the defendant; a list of more than 250 specific items of unreported corporate receipts between October 6, 1958, and December 31, 1959; and the dates, amounts and payors of specific sales which had not been entered on the corporate books. Moreover, defendant is in a better position than anyone else to know the circumstances of his own admissions or statements on which the government might be relying. In short, the additional disclosures which Judge Will has ordered seem hardly necessary to avoid unfair surprise or to predicate a later plea of double jeopardy.

Nor did Judge Will justify his order by reference to considerations traditionally deemed relevant to requests for bills of particulars. He stated that the burden was on the government to establish that the defendant was not entitled to the names of witnesses, and that if this burden were not met "I don't see any reason for being secretive about who your witnesses are." (R. 65, 66.) He said: "I have great concern that in a civil case we require both sides to submit their

witnesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases." (R. 75.) Most pointedly, Judge Will stated that he "would go further" than the Advisory Committee on Criminal Rules whose proposals were then pending before this Court (R. 77). In fact, Judge Will freely acknowledged that he has adopted a rule whereby the defendant in every criminal case is automatically entitled to "a reasonable opportunity to know * * * who was present * * * and then let the defendant go out and interview the people if he so desires and see what they are going to say." (R. 71.) He avowed that it is his invariable rule to require the government "to identify the people with whom the defendant is supposed to have participated in an illegal act but who were present." (R. 70–71.) In sum, his rationale is that the criminal defendant is entitled to a discovery opportunity analogous to that vouchsafed to civil parties. Whatever the abstract merits of this approach, it is in patent conflict with existing law.

C. Such a rule of disclosure also offends the teachings of *Roviaro* v. *United States,* 353 U.S. 53, and *Rugendorf* v. *United States,* 376 U.S. 528, that the informant's privilege is important and will yield only to a particularized showing of need in an individual case. Cf. *McCray* v. *Illinois,* 386 U.S. 300. In ruling that, regardless of circumstances, the defendant is entitled

to know who was present when he made any statements relating to the alleged crime, Judge Will has ignored the rulings in *Roviaro* that the informant's privilege is important for "the furtherance and protection of the public interest in effective law enforcement" (355 U.S. at 59) and that a decision whether it should yield in an individual case depends upon the particular circumstances at hand, rather than upon rigid rules (*id.* at 62).[8] The present circumstances are far removed from those in *Roviaro,* where the informant was the sole participant (other than the accused) in the transaction giving rise to the alleged offense and hence the "only witness in a position to amplify or contradict the testimony of government witnesses" who had observed the offense from some distance (*id.* at 64). The Court held that "under these circumstances" disclosure was required (*id.* at 65). No comparable circumstances are present here; in the instant case (as in *Rugendorf*) the defendant wholly "failed to develop the criteria of *Roviaro* necessitating disclosure * * *." 376 U.S. at 535.

We stress that here (unlike *Roviaro*) the government has promised to make available to the defendant at trial the names of any individuals (besides those who testify) who heard his admissions (R. 97, 99–100). Since the defendant will ultimately have an opportunity to hear the testimony (or, in any event, learn the identity) of the informants, his interest in immediate disclosure is no more than a desire to enjoy the advantages of pre-trial discovery—a privilege, as

[8] Judge Will's offer to permit the government to prove that the defendant in the present case would, in fact, be likely to intimidate witnesses or fabricate a defense is small comfort; such proof is rarely possible.

we have seen, denied defendants under the criminal rules. This doubtful interest cannot override the "public interest in protecting the flow of information" (*Roviaro, supra,* 353 U.S. at 62), which entitles the government to shield its informants from harassment prior to trial (see *United States* v. *Schneiderman,* 104 F. Supp. 405, 409 (S.D. Cal.); cf. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400)—at least in the absence of a showing of particularized need, not attempted here, for immediate disclosure.

II. THE COURT OF APPEALS HAD AUTHORITY TO ISSUE A WRIT OF MANDAMUS TO CORRECT JUDGE WILL'S PERSISTENT REFUSAL TO OBSERVE THE LIMITATIONS IMPOSED BY THE FEDERAL RULES OF PROCEDURE UPON DISCOVERY IN CRIMINAL CASES

We have urged, under Point I, that Judge Will has exhibited a persistent disregard for the settled limitations which the Federal Rules of Criminal Procedure impose upon discovery, as evidenced by his action in the present case in directing the government to furnish—in practical effect—the particulars of its evidence. This refusal, we have argued, is not isolated or marginal error but a clear abuse of discretion. It remains to consider whether, as the court of appeals believed, such an abuse may be corrected by mandamus. We think so.

A. The All Writs Act, 28 U.S.C. 1651(a), empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As this Court stated in *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26, "The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine

an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." See, *e.g., Ex parte Peru,* 318 U.S. 578, 584, and cases cited. However, even in *Roche,* the Court made clear that the concept of a "jurisdictional error," the only kind correctible by mandamus, was not a narrow or technical one. Not only did the Court reject, as inappropriate to the deployment of an extraordinary remedy, "formal rules rigorously controlling judicial action" (319 U.S. at 26); it made clear that among the special circumstances justifying the issuance of the writ was "persistent disregard of the Rules of Civil Procedure prescribed by this Court" (*id.* at 31).

Later cases have abandoned the jurisdictional touchstone of the writ's availability altogether, stressing, rather, its propriety as a corrective of serious misinterpretations of the federal rules in instances where the ordinary remedy of appeal is inadequate. In *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, the Court—over vigorous dissent—upheld as proper the issuance of the writ by a court of appeals to correct a district court's practice of referring to masters cases that were not truly "exceptional" within the meaning of Rule 53(b) of the Federal Rules of Civil Procedure. The jurisdiction of the district court to make such references was not questioned. The Court described the unjustified references as constituting "little less than an abdication of the judicial function" (352 U.S. at 256). But Rule 53(b) was, of course, an express grant of authority. In nevertheless upholding the use of the writ

this Court emphasized "that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal systems" (*id.* at 260) and that the improper practice indulged by the district court had been frequent rather than isolated (*id.* at 258).

The principle of *LaBuy*—that in appropriate circumstances mandamus will lie to compel a district judge to comply with the federal rules of procedure whether or not he has actually exceeded his jurisdiction—was reaffirmed, quite recently, in *Schlagenhauf* v. *Holder,* 379 U.S. 104. The district court had ordered the defendant in a personal-injury case to undergo a medical examination, and the court of appeals had refused to issue a writ of mandamus directing the district court to vacate its examination order. The initial question for this Court was whether the order could properly be reviewed by mandamus. The Court was unanimous that it could be. There was no jurisdictional issue in the usual sense. The district court's jurisdiction of the parties and of the subject matter of the suit was not questioned, the only dispute being over the court's power under Rule 35(a). Nor did this Court cast the issue in jurisdictional terms. It declared that "[t]he writ is appropriately issued * * * when there is 'usurpation of judicial power' or a clear abuse of discretion" (379 U.S. at 110) and that "the basic, undecided question of whether a district court could order the mental or physical examination of a defendant" was the type of issue appropriately reviewed by mandamus (*ibid.*).

B. It would now seem settled, and beyond serious dispute,[9] that the courts of appeals have the power to correct by mandamus district court rulings which evince a clear and persistent disregard of the federal rules of procedure or involve a fundamental issue of first impression. The present case meets both criteria. As in *LaBuy*, the action of the district court challenged here—Judge Will's approval of the use of the bill of particulars as a device to compel criminal discovery—represents no isolated error, but a persistent practice by this district judge, and one that we have argued is clearly, not merely debatably, contrary to the federal rules. A pattern of manifest non-compliance with the rules governing federal criminal trials would appear to present a clear-cut instance for a court of appeals to exercise its supervisory authority over the district courts of its circuit. And, as in *Schlagenhauf*, the issue in the present case is both one of fundamental importance—since, if Judge Will's view of the scope of criminal discovery prevails, it is obvious that the character of federal criminal proceedings will be markedly altered—and one of first impression, in view of the recent amendments of the criminal rules.

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[9] The decisions of the courts of appeals have been fully consonant with the liberal view expressed in *LaBuy* and *Schlagenhauf*. *E.g.*, *Atlass* v. *Miner*, 265 F. 2d 312 (C.A. 7), affirmed without consideration of the propriety of the use of the writ, 363 U.S. 641; *In re Watkins*, 271 F. 2d 771 (C.A. 5); *Hartley Pen Co.* v. *United States District Court*, 287 F. 2d 324 (C.A. 9). The Second Circuit decision, *United States* v. *Bondy*, 171 F. 2d 642 (C.A. 2), on which petitioner relies (Br. 26–27), is no longer followed in that circuit. See *United States* v. *Cashin*, 281 F. 2d 669, 671 (C.A. 2).

Nor is the authority of *LaBuy* and *Schlagenhauf* weakened in the present context by the fact that they were civil, rather than criminal, cases. In our view, their principles apply with equal force in the criminal area, as the courts of appeals have uniformly supposed (*In re United States,* 348 F. 2d 624 (C.A. 1); *United States* v. *Igoe,* 331 F. 2d 766 (C.A. 7), certiorari denied, 380 U.S. 942; *United States* v. *Cashin,* 281 F. 2d 671 (C.A. 2); *United States* v. *United States District Court,* 209 F. 2d 575 (C.A. 6)); this Court itself, we point out, has approved the use of the writ in criminal cases (*United States* v. *Smith,* 331 U.S. 469; *Ex parte United States,* 287 U.S. 241; *Ex parte United States,* 242 U.S. 27; cf. *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240).

The supervisory responsibilities of the courts of appeals and of this Court are certainly not less in the criminal than in the civil sphere; they may indeed be greater. See, *e.g., McNabb* v. *United States,* 318 U.S. 332; *Rea* v. *United States,* 350 U.S. 214. It would be anomalous, therefore, if there were no mechanism for ensuring the compliance of the district courts with the rules prescribed by this Court (with the assent of Congress) for criminal proceedings. Yet that, in effect, is the result for which petitioner here contends. To be sure, the government could disobey Judge Will's ruling, and if the indictment were, in consequence, dismissed by him, an appeal might lie (see 18 U.S.C. 3731)—as it would if a contempt judgment were entered against the government attorney. See *In re United States,* 348 F. 2d 624, 625 (C.A. 1). But, surely, the remedy of

mandamus is much to be preferred to a procedure—uncertain[10] and unseemly—that requires the government, as the condition of obtaining appellate review, to flout the district court's ruling. Cf. *United States* v. *Mine Workers,* 330 U.S. 258.

Petitioner notes that the occasions on which the government may appeal in a criminal case are sharply limited, and argues that the policy which this limitation reflects could be defeated if mandamus were freely available to the government to contest rulings of the trial judge in a criminal case. But we do not urge the appropriateness of mandamus as a routine method of review, or quarrel with this Court's frequent statements that the writ is to be reserved for "special circumstances" (*e.g., Schlagenhauf,* 379 U.S. at 111). We assume that, in the criminal as in the civil sphere, the writ will not issue where "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States,* 351 U.S. 513, 520. We have been at pains to suggest that the circumstances of the present case are indeed special. Here, a federal judge has applied his consistent interpretation of the federal rules as authorizing (in effect) discovery against the government in a criminal case. This is not a routine rul-

[10] Initially, Judge Will suggested that, rather than dismiss the indictment or hold the government attorney in contempt, he would simply postpone the date of trial indefinitely (R. 78–80). Had he done so, the government could not have appealed. Moreover, some courts view a dismissal of an indictment on grounds unrelated to the validity of the indictment itself as beyond the scope of the Criminal Appeals Act. *E.g., United States* v. *Apex Distributing Co.,* 270 F. 2d 747 (C.A. 9).

ing. It raises an issue of obvious importance that should be promptly and authoritatively resolved. To recognize the availability of mandamus—the only practical remedy—in such a case would not invite its wholesale and undiscriminating use as a substitute for appeal.

CONCLUSION

The judgment of the court of appeals, issuing a writ of mandamus against petitioner, should be affirmed.

Respectfully submitted.

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APPENDIX

The Federal Rules of Criminal Procedure (as amended to July 1, 1966) provide in pertinent part:

RULE 7. THE INDICTMENT AND THE INFORMATION

* * * * *

(f) BILL OF PARTICULARS. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 15. DEPOSITIONS

(a) WHEN TAKEN. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) NOTICE OF TAKING. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) DEFENDANT'S COUNSEL AND PAYMENT OF EXPENSES. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) HOW TAKEN. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) USE. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a dep-

osition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) OBJECTIONS TO ADMISSIBILITY. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

RULE 16. DISCOVERY AND INSPECTION

(a) DEFENDANT'S STATEMENTS; REPORTS OF EXAMINATIONS AND TESTS; DEFENDANT'S GRAND JURY TESTIMONY. Upon a motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government and (3) recorded testimony of the defendant before a grand jury.

(b) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision

(a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) DISCOVERY BY THE GOVERNMENT. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) TIME, PLACE AND MANNER OF DISCOVERY AND INSPECTION. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) PROTECTIVE ORDERS. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted

or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) TIME OF MOTIONS. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. As amended Feb. 28, 1966, eff. July 1, 1966.

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